STATE OF MICHIGAN

COURT OF APPEALS

EDITH MEAD and DAVID MEAD,

Plaintiffs-Appellants,

v

ST. CHARLES PRO BOWL,

Defendant-Appellee.

UNPUBLISHED
September 22, 2005

No. 255982
Saginaw Circuit Court
LC No. 03-049072-NO

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

In this premises liability action, plaintiffs appeal as of right from a trial court order granting defendants' motion for summary disposition under MCR 2.116(C)(10). This action arises out of a slip and fall on defendant's premises. We affirm.

On the night of the accident, plaintiffs attended moonlight bowling at defendant's bowling alley. Plaintiffs left the bowling alley sometime after midnight and proceeded to the parking lot. David Mead cut across the parking lot to retrieve the couple's vehicle while Edith continued to the end of the sidewalk. Plaintiffs allege that the light in a nearby lamp pole appeared to be broken. When Edith Mead reached the end of the sidewalk, she slipped on a patch of ice and injured herself. Both plaintiffs testified that the patch of ice was impossible to see because it was black ice and because of the poor lighting conditions.

Plaintiffs first argue that the court erred by requiring them to prove defendant had notice of the alleged condition and by concluding that they failed to establish a genuine issue of fact. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues, MCR 2.116(G)(4); Maiden *v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and must support his position with affidavits, depositions, admissions, or other documentary evidence, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Once this burden has been met, the opposing party must show that a genuine issue of material fact exists. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994). When the burden of proof at trial would rest on a

nonmoving party, the nonmoving party may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts to show that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

The existence of a disputed fact must be established by admissible evidence. MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). A mere promise to offer factual support at trial is insufficient. *Maiden, supra* at 121. The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A landowner owes a duty to an invitee to exercise reasonable care to protect the invitee[1] from unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). Accordingly, on the issue of notice, a premise owner is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees, or, if otherwise caused, was known to the premise owner, or has existed a sufficient length of time that he should have had knowledge of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). While negligence may be established by circumstantial evidence, the circumstances must be such to "take the case out of the realm of conjecture and within the field of legitimate inferences from established facts . . . ." *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 9; 279 NW2d 318 (1979).

Here, plaintiffs assert the alleged patch of ice was an unnatural accumulation caused by defendant. Specifically, plaintiffs claim that defendant created a snow bank that melted and refroze in a depression in the sidewalk. However, plaintiffs' argument relies on speculation and conjecture. For example, Edith Mead's opinion that defendant created the snow bank does not appear to be based on personal knowledge. MRE 602. She never testified that she actually observed defendant or an employee of defendant shoveling or plowing snow to create the bank in question. The existence of a disputed fact must be established by admissible evidence. MCR 2.116(G)(6); *Veenstra, supra* at163 (2002). And, even if defendant created the snow bank, plaintiffs have failed to provide any evidence, beyond their own speculations, that defendant created the ice patch.

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[1] Invitee status is commonly conferred on a person entering the property of another for business purposes. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 598-599; 614 NW2d 88 (2000). Defendant does not dispute plaintiffs were invitees the night of the accident.

Additionally, even if the ice was formed according to the mechanisms advanced by plaintiff, there is no evidence that defendant knew the snow would melt, run into the depression and refreeze to create the patch of ice. No testimony was offered to show a puddle had formed in the depression in the past or that the conditions were such that defendant must have been able to foresee the potential danger. Thus, plaintiffs have failed to "take the case out of the realm of conjecture." *Whitmore, supra* at 9.

Further, assuming the condition was a natural accumulation of ice, plaintiffs have failed to set forth facts that would indicate that defendant had knowledge of the condition or should have discovered it. Whether the ice patch was ever visible to defendants is a matter of speculation, as is the length of time that the ice existed. Edith Mead testified that she had no reason to believe that the employees of St. Charles Pro Bowl knew of the patch of ice. David Mead testified that the ice patch was impossible to see because there was no differentiation between the sidewalk and the ice patch. Both plaintiffs testified that the area was dark because the lamp pole was not working. In cases where a plaintiff asserts that a defendant had constructive knowledge of a condition based upon the length of time it existed, our Supreme Court and this Court have rejected theoretical explanations that are unsupported by a reasonable inference. See, e.g., *Serinto v Borman Food Stores*, 380 Mich 637, 644; 158 NW2d 485 (1968); *McCune v Meijer, Inc*, 156 Mich App 561, 563; 402 NW2d 6 (1986).

Next, plaintiffs argue that they offered proof that defendant violated a village ordinance and thereby created an issue of fact regarding notice. Again, we disagree. Plaintiffs have failed to preserve this issue for appeal by arguing below that violation of an ordinance either proved notice or vitiated the notice requirement. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). This Court reviews unpreserved issues for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

"It is well established that violation of an ordinance is evidence of negligence." *Cassibo v Bodwin*, 149 Mich App 474, 477; 386 NW2d 559 (1986). "However, violation of an ordinance must be pleaded and proved." *Id.* Here, plaintiffs failed to include an allegation that defendant violated the city ordinance in their pleadings. Additionally, plaintiffs have offered no proof that the lighting was not "sufficient to allow safety for users at any time." St. Charles Municipal Code, § 26-56(g). We conclude, therefore, the trial court did not commit plain err when it concluded that plaintiffs failed to establish that a genuine issue of disputed fact existed.

We also reject plaintiffs' argument that the court erred when it dismissed their nuisance claim. Defendant filed a motion for summary disposition arguing that the court should dismiss plaintiffs' nuisance claim. Plaintiffs opposed defendant's motion to summarily dismiss plaintiffs' nuisance claim but failed to address the matter in their brief or during the motion hearing and have thus failed to preserve this issue for appeal. *Fast Air, Inc, supra* at 549. In addition, plaintiffs have abandoned this issue on appeal by failing to address the merits of their purported nuisance claim, by failing to inform this Court whether they are stating

a claim for public or private nuisance, and by failing to cite nuisance law or apply the facts of the case to such law. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Talbot
/s/ Stephen L. Borrello